Supreme Court, U.S.
FILED

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In the
Supreme Court of the United States

October Term, 1994

No. _____

DAVID J. SHIELDS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

BRIEF OF PETITIONER DAVID J. SHIELDS

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QUESTIONS PRESENTED

1. Whether the Seventh Circuit, in denying Shields' motion under Fed. R. Crim. P. 33 for a New Trial, applied an incorrect and overly rigorous test to the "materiality" prong of the *Brady/Giglio* standard?

2. Whether the large number of *Brady/Giglio* violations in recent years necessitates review of this case by this Court for purposes of clarifying and reaffirming the principles upon which the *Brady/Giglio* doctrine is based?

LIST OF PARTIES

The parties to the proceeding below were the Petitioner, David J. Shields, and the Respondent, the United States of America.

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In The
Supreme Court Of The United States

October Term, 1994

UNITED STATES OF AMERICA,

Respondent,

v.

DAVID J. SHIELDS,

Petitioner.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

The Petitioner, David J. Shields, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for Seventh Circuit, entered in the above-entitled proceeding on June 28, 1994.

OPINION BELOW

The opinion of the Court of Appeals for the Seventh Circuit is unpublished (although the result therein is reported at *United States v. Shields*, 30 F.3d 137 (7th Cir. 1994)) and is reprinted in the appendix at page A-1. The opinion of the district court addressing the questions presented by Petitioner Shields is reprinted at A-4.

JURISDICTION

The Seventh Circuit affirmed the district court's denial of Petitioner Shields' Rule 33 Motion for a New Trial on June 28, 1994. A-1. This Court has jurisdiction to review the Seventh Circuit's decision under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Federal Rule of Criminal Procedure 33

The court on motion of a defendant may grant a new trial to that defendant if required in the interest of justice. If trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 7 days after verdict or finding of guilty or within such further time as the court may fix during the 7-day period.

STATEMENT OF THE CASE

Petitioner Shields, a former state court judge, was convicted of accepting bribes in connection with a fictitious case filed by the FBI. At trial, it was undisputed that a government informant named Robert Cooley gave bribe money to Pasquale F. DeLeo. The government contended that DeLeo passed the money to Shields. Shields contended that DeLeo kept Cooley's money and sold a phoney judicial fix instead. There was no direct evidence of Shields asking for or accepting a bribe — no witness, no tape recording, no document.

Cooley was the government's star witness. Cooley claimed that he bribed "over 29" state court judges in Cook County, Illinois. The government's pretrial disclosures were consistent with this testimony. In response to Shields' specific request to disclose exculpatory and impeaching evidence, the Government informed Shields that Cooley purportedly bribed numerous state court judges. The government first disclosed that information to Shields' counsel in connection with another case that was tried before Shields' case and in which Cooley testified. Later, prior to Shields' trial, the government stated in a letter to Shields' counsel that its previous disclosure regarding Cooley "constitutes our *Giglio/Brady* submis-

sion." That submission included FBI "302" reports listing the numerous judges that Cooley claimed to have bribed. The government did not disclose any evidence contradicting Cooley's claim of having bribed multiple judges. Shields accordingly relied on the government's implicit representation that Cooley had – and always had maintained that he had – bribed numerous judges.

Cooley subsequently testified at trial that corruption was rampant among state court judges in Cook County and that he had bribed more than 29 such judges:

> Q: What kinds of people did you pay bribes to fix cases?
>
> A: Police officers, judges, state's attorneys, corporation counsels.
>
> * * *
>
> Q: How many different judges did you pay?
>
> A: I know there were over 29. When I sat and tried to recall the different judges I had dealt with, there were 29 that came to mind. I'm certain there were more than that. I just couldn't think of them at the time.

(Tr. 220-21.)[1] For Shields, a former Cook County state court judge, Cooley's testimony about wide-spread judicial corruption was devastating — particularly because Shields was not able to impeach

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1 The documents cited in support of this Statement of the Case — such as the transcript of Shields' trial, Shields' Rule 33 New Trial Motion and certain FBI 302 reports discussed *infra* — are all contained in the record that was before the Seventh Circuit. Specifically, the trial testimony cited above is contained in the Appendix to Shields' Opening Brief in the Seventh Circuit; Shields' Rule 33 New Trial Motion is part of the general record that was before the Seventh Circuit and the FBI 302 reports were filed under seal in the Seventh Circuit in a Supplemental Appendix.

Cooley's testimony on the matter. Instead, Shields was reduced to limiting the impact of the testimony by eliciting from Cooley that Shields was not among the judges that Cooley specifically recalled bribing.

The jury deliberated for four days and returned a guilty verdict against Shields on September 24, 1992. The district court sentenced Shields on March 2, 1992, and Shields filed a timely notice of appeal on March 12, 1992, giving the Seventh Circuit jurisdiction under 28 U.S.C. § 1291 and Fed. R. App. P. 4(b). In its opinion affirming Shields' conviction on direct appeal, the Seventh Circuit recognized that "the government's case lack[ed] the kind of unassailable clarity one might wish to see in a prosecution of this sort." *United States v. Shields*, 999 F.2d 1090, 1093 (7th Cir. 1993). This Court denied certiorari on January 18, 1994. *Shields v. United States*, 114 S. Ct. 877 (1994).

Unbeknownst to Shields, however, the government was aware during the trial[2] of a critical piece of evidence that it had failed to disclose: Cooley had stated in 1986 during an interview with a senior supervisor in the U.S. Attorney's Office, Assistant United States Attorney Gary Shapiro, that he had never bribed any Cook County judges. Subsequently, on July 21, 1993, during proceedings in *United States v. Stillo*, yet another case in which Cooley was a government witness, AUSA Shapiro testified as follows:

---

2 As set forth more fully *infra*, it is not clear that the trial prosecutors in Shields' case were aware of this evidence; it was, however, undoubtedly known to a senior prosecutor in the United States Attorney's Office who was not involved in Shields' trial. For purposes of the *Brady/Giglio* analysis, however, this distinction is meaningless; it is enough that any lawyer in the United States Attorney's Office, whether or not the trial prosecutor, is aware of the evidence. *Giglio v. United States*, 405 U.S. 150, 154 (1972) (ignorance by trial prosecutor does not excuse *Brady* violation if the *Brady* material is known to others in a U.S. Attorney's Office).

Q: In the first meetings [with Cooley after he approached the government], the meeting you had March 13th, March 18th, March 20th, April 1st [1986] — could you see that he was lying?

A: Mr. Genson, I can only remember one lie that Bob Cooley ever told, at least to me.

Q: Well, do you remember him telling you that he never bribed Jim LeFevour? Do you remember reading the report that said that?

A: *I remember him saying to me that he didn't have to ... bribe Judges* because he was with the First Ward, and when you were with the First Ward, *everybody knew* what was supposed to happen. I remember him saying that to me.

Q: He said that to you?

A: And that's the lie I recall.

* * *

Q: *So in March of 86, he said to you that he didn't have to bribe Judges* because he was with the First Ward. And when you are with the First Ward, the Judges know what do do. He said that, didn't he sir?

A: *I believe so, yes, sir.*

(R. 427, Shields' Memorandum In Support Of Rule 33 Motion For New Trial, Ex. C, pp. 29-30)(emphasis added). The government did not reveal this critical exculpatory evidence to Shields until July 23, 1993 — more than a year and a half after Shields was convicted and one week after the Seventh Circuit affirmed Shields' conviction. The government made this revelation voluntarily at that time without further inquiry by defense counsel.

On November 22, 1993, Shields filed his Rule 33 Motion for a New Trial, asserting his entitlement to a new trial on the ground that Cooley's statements to Shapiro constituted favorable, material

evidence that the government had wrongfully suppressed in violation of *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972). The jurisdiction of the district court was based upon 18 U.S.C. § 3231. On February 4, 1994, the district court denied Shields' motion on the ground that the newly discovered evidence, while favorable to Shields and wrongfully suppressed, was not material. On February 11, 1994, Shields filed his timely Notice of Appeal, giving the Seventh Circuit jurisdiction under 28 U.S.C. § 1291 and Fed. R. App. P. 4(b). On June 28, 1994, the Seventh Circuit affirmed the district court, holding, as the district court had, that the evidence was not material.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT THE WRIT ON THE SEVENTH CIRCUIT'S *BRADY/GIGLIO* DECISION

This Court has long recognized that the failure of prosecutors to turn favorable evidence over to a defendant raises constitutional concerns and undermines confidence in the fairness and accuracy of the criminal justice system. In *Brady*, this Court held that "[t]he suppression by the prosecution of evidence favorable to an accused violates due process where the evidence is material either to guilt or punishment." *Brady*, 373 U.S. at 88. Later, in *Giglio*, this Court held that the suppression of material evidence affecting a government witness' credibility constitutes a *Brady* violation. *Giglio*, 405 U.S. at 154.

To demonstrate a *Brady/Giglio* violation, a defendant must establish three elements: (1) that the government suppressed evidence; (2) that the evidence was favorable to the defense; and (3) that the evidence was material. *Moore v. Illinois*, 408 U.S. 786, 794-95 (1972). Here, the government conceded in the district court that Cooley's statements to Shapiro were suppressed and were favorable to Shields. *See* A-6, 9-10. At issue in this case, therefore, is the third prong of the *Brady/Giglio* standard: the materiality of the evidence.

"The proper standard of materiality," Justice Stevens wrote for the Court in *United States v. Agurs*, "must reflect our overriding

concern with the justice of the finding of guilt." *United States v. Agurs*, 427 U.S. 97, 112 (1976). This Court's last decision involving *Brady/Giglio*, *United States v. Bagley*, 473 U.S. 667 (1985), reflected this concern. In *Bagley*, this Court held that suppressed evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Bagley*, 473 U.S. at 682. "A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Id.*

In this case, the Seventh Circuit has, without explicitly saying so, reformulated the materiality standard laid down in *Bagley*: "reasonable probability" has become "near certain probability." The result is that the protections afforded criminal defendants by the *Brady/Giglio* rule have been greatly diluted. This Court therefore should grant certiorari to reaffirm the principle that the "materiality" prong of *Brady/Giglio* is satisfied where there is a "reasonable," and not "near certain," probability that the result would have been different had the suppressed evidence been disclosed.

A. The Seventh Circuit's Decision

In its decision on Shields' direct appeal, the Seventh Circuit explicity recognized that the evidence was close

> We grant the validity of Shields' argument that *the government's case lacks the kind of unassailable clarity one might wish to see in a prosecution of this sort*: photographs of cash changing hands, tapes of co-conspirators talking about how they are going to spend the money, a parade of witnesses corroborating the illicit transactions. Nevertheless, the government amassed a credible and coherent case against both defendants.

Shields, 999 F.2d at 1093 (emphasis added). Later, however, after the government disclosed the existence of Cooley's statements to Shapiro, the Seventh Circuit took a different view of the evidence at trial. The Seventh Circuit held that the new evidence, while favorable to Shields and suppressed by the government, was not material.

Specifically, the court held that the new evidence was not material for two reasons:

> (1) The newly disclosed evidence was cumulative of other material that was available to Shields for use in impeaching Cooley's credibility;[3] and,
>
> (2) There was other evidence in the record that was not impacted by the government's disclosures and that supported the jury's verdict.[4]

As we show below, neither of these propositions is supported by the record. Thus, instead of being based on the record, the Seventh Circuit's decision is actually based upon the application of a materiality standard far more rigorous than the "reasonable probability" test set forth by this Court in *Bagley*.

B. The New Evidence Was Not Cumulative

The Seventh Circuit held that the newly discovered evidence was cumulative of impeachment material that Shields already possessed. Even without the new evidence, the Seventh Circuit held, Shields "thoroughly impeached" Cooley. A-3. Nothing could be further from the truth. Shields did not receive cumulative, or even substantially similar, evidence from the government. The Seventh Circuit's finding to the contrary does not reflect the record; it reflects the application of an overly rigorous materiality standard.

Alleged "substantially similar" evidence renders suppressed evidence immaterial only when the defendant knew "the essential

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3 Specifically, the court held that "Cooley was thoroughly impeached" and "additional exploration of Cooley's many and varied inconsistent statements" would not have altered the result. A-3.

4 Specifically, the court held that Shields' conviction "depended not so much on the testimony of Cooley ... as on the interpretation of ... tape recordings and Shields' statements to investigators, plus inferences to be drawn from meetings between DeLeo and Shields." A-2.

facts permitting him to take advantage of any exculpatory evidence." *United States v. Grossman*, 843 F.2d 78, 85 (2d Cir. 1988), *cert. denied*, 488 U.S. 1059 (1989); *United States v. Gaggi*, 811 F.2d 47, 59 (2d Cir.), *cert. denied*, 482 U.S. 929 (1987). No such finding is possible here.

First, the suppressed evidence was Cooley's statement to AUSA Gary Shapiro that Cooley *never bribed a judge*:

> I remember [Cooley] saying to me that he didn't have to ... bribe Judges because he was with the First Ward, and when you were with the First Ward, everybody knew what was supposed to happen. I remember him saying that to me.

The purported substantially similar evidence is an FBI 302 dated April 3, 1986, which clearly does not contain the "essential facts" of the suppressed evidence. Indeed, far from stating that Cooley never bribed a judge, the April 3, 1986 302 in fact records Cooley's claimed bribery of *four judges*. Moreover, the 302 in no way suggests that Cooley's bribery was limited to those four judges; it merely deals with Cooley's inability to recall precise methods of bribery: "Cooley advised that he does not recall at this time ever paying a judge hand-to-hand" even though he recalled paying numerous bribes through conduits. The April 3, 1986 FBI 302 thus does not provide the "essential fact" of Shapiro's testimony that Cooley said he *never* had to bribe judges.

Second, the government further contended, and the Seventh Circuit apparently accepted, that Shields' election not to use the April 3, 1986 302 to impeach Cooley undermines his claim that the suppressed evidence is material. That contention simply ignores the reality of Cooley's trial testimony. Cooley's claim of rampant judicial corruption in Cook County could not have been impeached with a 302 reciting Cooley's claims of bribing numerous judges, regardless of Cooley's inability to recall "at [that] time" the precise methods of bribery. The "impeachment" based on the April 3, 1986 302 would have related to the methods of bribe payment or, at most, to the *number* of judges Cooley claimed to have bribed. The impeachment based on Cooley's statement to Shapiro would have related to whether Cooley had *ever* bribed any judges.

Third, the government similarly attempted to equate an April 14, 1986 FBI 302 with the suppressed evidence that "everybody knew" that First Ward attorneys did not have to pay bribes. The April 14, 1986 302 obscurely states that Cooley's success in traffic court was "mainly due to his associations and social connections with former police officers and most recently individuals connected with the First Ward." Most significantly, the statement refers to *traffic court*, which was a well-known bastion of judicial corruption, not Chancery Court, where Shields presided. In addition, the statement says nothing about whether Cooley was paying bribes in traffic court. In the context of the multiple 302's indicating that Cooley paid police officers for false testimony and used First Ward associates as conduits for bribes, the statement could just as well mean that Cooley's First Ward associations enabled him to pay bribes. Without the evidence suppressed by the government that Cooley never bribed a judge and that bribery was not necessary for First Ward attorneys, the statement in the April 14, 1986 FBI 302 was meaningless and useless to Shields.

The message underlying these errors in the Seventh Circuit's analysis could not be more clear: a defendant alleging a *Brady/Giglio* violation must show more than a "reasonable probability" of a different outcome; he must show that such an outcome was "nearly certain." Nothing else but the application of this heightened and incorrect standard can explain the Seventh Circuit's willingness to overlook the foregoing facts.

C. The Government's Failure To Disclose This Evidence Undermines The Confidence In The Outcome Of This Case

The Seventh Circuit also held that, even if the new evidence did undercut Cooley's credibility, there was sufficient additional evidence to support the jury's verdict such that confidence in the correctness of the verdict was not undermined. A-2. This is patently incorrect. The government's failure to disclose the evidence at issue no doubt undermines confidence in the outcome of this case, and the Seventh Circuit's studied ignorance of this fact is further proof that it applied a heightened materiality standard in this case.

In its opinion affirming Shields' conviction, the Seventh Circuit recognized that the evidence was extremely close:

> We grant the validity of Shields' argument that *the government's case lacks the kind of unassailable clarity one might wish to see in a prosecution of this sort*: photographs of cash changing hands, tapes of co-conspirators talking about how they are going to spend the money, a parade of witnesses corroborating the illicit transactions. Nevertheless, the government amassed a credible and coherent case against both defendants.

Shields, 999 F.2d at 1093 (emphasis added).[5] When considering Shields' New Trial Motion, however, the Seventh Circuit held that the newly discovered evidence would not have made a difference to the outcome. The Seventh Circuit was right the first time. The new evidence was clearly material and there was a reasonable probability that the outcome would have been different had the evidence been disclosed – enough to satisfy this Court's standards, but not those of the Seventh Circuit.

First, the evidence contradicts Cooley's testimony that judicial corruption was epidemic in Cook County. ***Second***, the evidence undermines the credibility of Cooley, the government's star witness who testified that he had "no doubt" that DeLeo passed the money to Shields. ***Third***, the evidence provides key support to Shields' theory of defense. Any one of these factors alone is sufficient to demonstrate that there was a "reasonable probability" that the outcome of this case would have been different had the evidence been disclosed. The Seventh Circuit's unwillingness to accord these factors appropriate weight in its analysis is further proof of the application of a materiality standard far more rigorous

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5 Even the jury revealed its belief that the evidence against Shields was close. The jury returned its guilty verdict only after four days of deliberations. During deliberations, they asked the district court: "Is it possible to convict one of the defendants on counts one through four while finding the other defendant innocent on those same charges?"

than that mandated by this Court's opinions. This is especially true in light of the Seventh Circuit's recognition in Shields' direct appeal that the evidence was extremely close.

In sum, the Seventh Circuit's opinion reflects a materiality standard that requires a "near certain probability" of a different result in order to obtain a reversal. This is in direct contravention of this Court's holding that only a "reasonable probability" of a different result is necessary. *Bagley*, 473 U.S. at 682. This Court therefore should grant certiorari and reverse the Seventh Circuit's decision.

II. THE LARGE NUMBER OF *BRADY/GIGLIO* VIOLATIONS IN RECENT YEARS SUPPORTS GRANTING THE WRIT

This Court last considered the *Brady/Giglio* standard in 1985 in *Bagley*. Since then, there has been an alarming trend of prosecutors disregarding the due process rights of defendants through withholding exculpatory evidence. Sadly, courts have allowed these abuses to go unchecked. Often, courts have commented on the impropriety of the prosecutor's conduct without overturning the defendant's conviction – frequently through the application of an incorrect standard of materiality. As a result, prosecutors are tempted, if not encouraged, to take the risk that evidence damaging to the government's case can be withheld and the worst they will come away with, if they are caught, is a slap on the wrist. Of course, this occurs at the expense of the defendant and the interests of justice. This problem has become endemic throughout the United States. The following cases make clear that the time has come for this Court to clarify and reaffirm the due process rights of defendants as first articulated in *Brady*:

In *United States v. Johnson*, 26 F.3d 669 (7th Cir. 1994), the government failed to disclose "its participation in delaying/dismissing three separate state charges against [a government witness] (strong-arm robbery and two misdemeanor thefts)." Although the court affirmed the conviction because "the conviction would have been obtained notwithstanding the failure to disclose the exculpatory evidence," the court "express[ed] [its] concern over the government's handling of this case" and stated that "[i]n the future" it

would "not hesitate to order a new trial if the government fails to make timely disclosure of all *Brady/Giglio* material."

In *Demjanuk v. Petrovsky*, 10 F.3d 338 (6th Cir. 1993), lawyers in the Justice Department's Office of Special Investigations failed to turn over to an accused Nazi war criminal interview memoranda and other information received from Eastern Bloc nations that exculpated him of the charges. The defendant had been extradited to Israel, tried there and sentenced to death when the collapse of the Soviet Union made the exculpatory information available to Israeli authorities. Relying on this information, the Israeli Supreme Court overturned the defendant's conviction and death sentence. Thereupon, the Sixth Circuit, which previously had affirmed the defendant's extradition, reopened the case upon its own motion and appointed a Special Master to take evidence and prepare a report on the question whether the government's failure to disclose the exculpatory evidence constituted prosecutorial misconduct and a fraud upon the court. Upon consideration of the Master's report, the court held that (1) *Brady* applied to extradition and denaturalization proceedings where the government seeks to extradite and denaturalize on the basis of criminal conduct by the defendant; (2) the government's failure to turn over the exculpatory information violated *Brady* and constituted a fraud upon the court; and (3) the judgment of denaturalization and extradition was vacated.

In *United States v. Brumel-Alvarez*, 991 F.2d 1452 (9th Cir. 1992), the government failed to disclose a memorandum that was highly critical of the integrity of a government informant and the informant's behavior during the investigation that led to the instant prosecution. The memorandum was written by a retired Drug Enforcement agent who was a government witness at trial. The court found that the government had violated *Brady* and ordered a new trial.

In *Jean v. Rice*, 945 F.2d 82 (4th Cir. 1991), North Carolina prosecutors failed to disclose to the defendant, who had been charged with rape, that two key witnesses, including the victim, had been hypnotized during the course of the investigation. The

court determined that this violated *Brady* and issued a writ of *habeas corpus*.

In *McDowell v. Dixon*, 858 F.2d 945 (4th Cir. 1988), *cert. denied*, 489 U.S. 1033 (1989), North Carolina prosecutors failed to disclose three items of evidence that undercut their theory that the defendant was guilty of felonious assault and murder: (1) an initial recollection by a surviving victim of her assailant as white, not black like the defendant; (2) a statement given by a neighbor that called into question the testimony of the surviving victim, and (3) a description of previous intruders at the victims' home as white. The court held that this violated *Brady* and conditionally issued a writ of *habeus corpus*.

Finally, in *United States v. Boyd*, 833 F. Supp. 1277 (N.D. Ill. 1993), *United States v. Andrews*, 824 F. Supp. 1273 (N.D. Ill. 1993), and *United States v. Burnside*, 824 F. Supp. 1215 (N.D. Ill. 1993), the government failed to disclose extraordinary benefits granted to its informant-witnesses. These cases arose from related, multiple-defendant prosecutions of members of an infamous Chicago street gang. The government's case at trial hinged on the testimony of certain gang members who had agreed to testify for the government. After three separate trials before three different district court judges resulted in the convictions of numerous defendants on several counts of wrongdoing, the defendants discovered that the government had failed to disclose that its witnesses had been granted extraordinary benefits while in custody prior to the trials, including *inter alia*: "access to prosecution memoranda, drugs, sex, ... unlimited free telephone calls; and various gifts, including cash, clothing, 'walkman' radios, food, cigarettes and beer." All three district judges who presided over these trials held that the government had violated *Brady* and ordered new trials for the defendants.

These cases demonstrate the need for this Court to again make clear to prosecutors nationwide that they must follow the *Brady/Giglio* rule. Failure to adhere to these strictures undermines public confidence in our system of justice and subjects innocent people to imprisonment or, as in *Demjanuk* and *McDowell*, to po-

tential execution. Judicial policy thus supports granting the writ in this case to breathe new life into *Brady/Giglio*.

CONCLUSION

For the reasons set forth above, petitioner David J. Shields respectfully requests that this Court grant certiorari, reverse the decision of the United States Court of Appeals for the Seventh Circuit in its entirety and order this case remanded to the district court for a new trial.

DATED: September 26, 1994

Respectfully submitted,

PETITIONER DAVID J. SHIELDS

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United States Court of Appeals
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Submitted May 25, 1994*
June 28, 1994.

BEFORE

Hon. Walter J. Cummings, Circuit Judge
Hon. William H. Timbers, Circuit Judge**
Hon. Frank H. Easterbrook, Circuit Judge

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*	)	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 94-1388 v.	)	
DAVID J. SHIELDS, *Defendant-Appellant.*	)	No. 90 CR 1044 Harry D. Leinenweber, *Judge.*

ORDER

David Shields was convicted of accepting a bribe to fix a case pending before him as a judge, violating several federal statutes. We affirmed the conviction. 999 F.2d 1090 (1993).

Shields later sought a new trial under Fed. R. Crim. P. 33, contending that newly discovered evidence undercut the credibility of Robert Cooley, a witness against him. At trial Cooley testified

* The panel heard oral argument on defendant's direct appeal from his conviction and has unanimously decided that an additional argument concerning post-judgment motions is unnecessary.

** Of the Second Circuit, sitting by designation.

that he had bribed more than a score of judges serving on the Circuit Court of Cook County. The newly discovered evidence is that in 1986 (long before the events underlying this prosecution) Cooley had told an Assistant United States Attorney that he "didn't have to bribe judges" because the judges favored attorneys from the First Ward without the need for remuneration. The district court agreed with Shields that this statement would have facilitated Cooley's impeachment, and with the implication that the prosecution violated its duties under *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972). (The AUSA who took the statement from Cooley did not participate in the prosecution of this case; Shields does not contend that any of the prosecutors in this case was aware of the 1986 statement, but *Brady* and *Giglio* do not depend on the extent of the trial prosecutors' knowledge.) The district court held that the additional evidence would not have made any difference to the trial and denied the motion for a new trial. Our review is deferential, *United States v. Kuzniar*, 881 F.2d 466 (7th Cir. 1989), and we conclude that the district court did not abuse its discretion or commit a clear error.

According to the prosecution, Pasquale DeLeo rather than Cooley bribed Shields. The prosecution's theory was supported by tapes of conversations between DeLeo and Shields, and by evidence of the movements of Shields and DeLeo and envelopes seen by federal agents at critical junctures. Cooley was DeLeo's former law partner and had approached DeLeo in an effort to have the case transferred to another judge—for, as Cooley told the jury, he had believed Shields honest. DeLeo told Cooley that he could bribe Shields. The theory of defense was that DeLeo defrauded Cooley—recognizing that Shields would rule for Cooley's client on the merits, DeLeo pocketed the money Cooley provided for transmission to Shields. The conviction depended not so much on the testimony of Cooley (who said on the stand that he thought Shields and most other state judges were honest) as on the interpretation of the tape recordings and Shields' statements to investigators, plus inferences to be drawn from meetings between DeLeo and Shields. The jury could have disbelieved most of what Cooley said and still convicted Shields.

Moreover, Cooley was thoroughly impeached. He admitted on the stand to bribing judges and committing other crimes—including the crime of perjury. Knowledge that Cooley had told a prosecutor in 1986 that he didn't have to bribe judges would not have added much, if anything, to what the defense already knew: that at the outset of his dealings with the federal government Cooley was not forthcoming and later ate many of these words. The prosecution against Shields did not depend on the jury's assessment of what proportion of Cooley's cases had been affected by payoffs; the evidence that Cooley gave money to DeLeo with instructions to pass it to Shields in this case was uncontested. Whether DeLeo carried through, and whether Shields took the money (if DeLeo proffered it), were the central questions, which would not have been illuminated by additional exploration of Cooley's many and varied inconsistent statements.

AFFIRMED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	Docket No. 93 CR 1044
	)	
– vs –	)	Chicago, Illinois
	)	February 4, 1994
	)	
DAVID SHIELDS,	)	9:00 o'clock a.m.
	)	
Defendant.	)	

TRANSCRIPT OF PROCEEDINGS BEFORE THE HONORABLE HARRY D. LEINENWEBER

APPEARANCES:

For the Plaintiff: MR. MICHAEL SHEPARD, AUSA
(Hon. James B. Burns
United States Attorney
219 South Dearborn Street
Chicago, Illinois 60604)

For the Defendant: MR. STEVEN F. MOLO
(Winston & Strawn
35 West Wacker Drive
Chicago, Illinois 60601)

THE CLERK: 93 CR 1044, United States of America vs. David Shields.

MR. SHEPARD: Good morning, your Honor. Mike Shepard on behalf of the United States.

MR. MOLO: Good morning, Judge. Steven Molo on behalf of David Shields.

THE COURT: On September 24, 1991 David Shields, a judge in the Circuit Court of Cook County was convicted of taking bribes to "fix" cases in his court. During his trial, Robert Cooley, a Cook County attorney, testified that he (Cooley) had bribed "over twenty-nine" Cook County judges. He also testified that he never bribed Shields. However, the government failed to disclose the fact that Cooley had previously told an assistant U.S. attorney that he "didn't have to bribe judges."

Defendant now moves the court for a new trial pursuant to Rule 38 [*sic*] of the Federal Rules of Criminal Procedure. In his motion, defendant argues that the evidence suppressed by the government directly impeaches the government's star witness, Robert Cooley. Defendant also claims that the evidence supports its theory of defense.

The United States Supreme Court has held that, "the suppression by the prosecution of evidence favorable to an accused violates due process where the evidence is material either to guilt or punishment." *Brady v. Maryland*, 373 U.S. 83, 88 (1963). Also, in *Giglio v. United States*, 405 U.S. 150, 154 (1972), the Court found that suppression of material evidence affecting a government witness's credibility constitutes a *Brady* violation. To demonstrate a

Brady/Giglio violation, a defendant must establish three elements: (1) The government suppressed evidence; (2) the evidence was favorable to the defense; and (3) the evidence was material. *Moore v. Illinois*, 408 U.S. 786, 794-95 (1972). The government in the case at hand does not contest the existence of the first two elements of the test. Instead, it claims that the evidence withheld is immaterial and cumulative of information that Shields already had.

Evidence is considered material only if the defendant demonstrates "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682 (1985). The defendant's burden is not met by the "mere possibility" that an item of undisclosed information might have helped the defense or affected the outcome of a trial. *United States v. Agurs*, 427 U.S. 97, 109-10 (1976).

Defendant Shields offers three reasons in support of his contention that the new evidence is material. First, defendant argues that the new evidence is material. First [*sic*], defendant argues that the new evidence contradicts Cooley's testimony that judicial corruption was wide-spread in Cook County. Second, according to defendant, the evidence withheld undermines Cooley's credibility. Lastly, defendant maintains that the new evidence bolsters the defense's theory that Cooley was sold a phony fix.

The court is not persuaded by defendant's arguments and denies the defendant's motion for a new trial under Rule 33. First, the new evidence that Cooley "didn't have to bribe judges" does not entirely contradict Cooley's testimony at trial. Cooley testified

during the trial that he appeared before Shields many times and never had any corrupt dealings with him. Tr. 275, 1028-29, Tr. 785. He also told the jury: "There were a lot of honest judges." Further, even if Cooley misled the jury about judicial corruption, this issue did not govern defendant's guilt or innocence.

Second, the court agrees that the statement withheld by the government would have aided the impeachment of Cooley. However, the court does not find that the lack of additional impeachment evidence raises a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Defendant had sufficient evidence to attack Cooley's credibility. Among other things, Cooley admitted to years of corrupt conduct as a police officer and lawyer. He also testified that he bribed clerks, police officers and judges, and admitted to lying under oath.

Finally, the court is not convinced that the new evidence would have bolstered defendant's theory that Cooley was sold a phony fix. Further, even if the evidence would have bolstered defendant's theory, the court finds that it is not of such great significance that it would have changed the result of the trial. It is the opinion of this court that the government produced sufficient direct and circumstantial evidence, aside from Cooley's testimony, to support defendant's conviction.

Defendant's Rule 33 motion for a new trial is denied.

MR. SHEPARD: Thank you, your Honor.

(Which were all the proceedings had in the above-entitled cause.)

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE RECORD PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

_____

Official Court Reporter Date

U.S. v. Shields 93 CR 1044

Oral Ruling — February 4, 1994*

On September 24, 1991 David Shields, a judge in the Circuit Court of Cook County, was convicted of taking bribes to "fix" cases in his court. During his trial, Robert Cooley, a Cook County attorney, testified that he (Cooley) had bribed "over 29" Cook County judges. He also testified that he never bribed Shields. However, the government failed to disclose the fact that Cooley had previously told an AUSA that he "didn't have to bribe judges."

Defendant now moves the court for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure. In his motion, defendant argues that the evidence suppressed by the government directly impeaches the government's star witness, Robert Cooley. Defendant also claims that the evidence supports its theory of defense.

The United States Supreme Court has held that, "the suppression by the prosecution of evidence favorable to an accused violates due process where the evidence is material either to guilt or punishment." *Brady v. Maryland*, 373 U.S. 83, 86 (1963). Also, in *Giglio v. United States*, 406 U.S. 150, 154 (1972), the Court found that suppression of material evidence affecting a government witness' credibility constitutes a *Brady* violation. To demonstrate a *Brady/Giglio* violation, a defendant must establish three elements: (1) the government suppressed evidence; (2) the evidence was fa-

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* Written Draft of Oral Ruling of Judge Leinenweber, United States District Court for the Northern District of Illinois

vorable to the defense; and (3) the evidence was material. *Moore v. Illinois*, 408 U.S. 786, 794-95 (1972). The government in the case at hand does not contest the existence of the first two elements of the test. Instead, it claims that the evidence withheld is immaterial and cumulative of information that Shields already had.

Evidence is considered material only if the defendant demonstrates "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have different." *United States v. Bagley*, 473 U.S. 667, 682 (1985). The defendant's burden is not met by the "mere possibility" that an item of undisclosed information might have helped the defense or affected the outcome of a trial. *United States v. Agurs*, 427 U.S. 97, 109-10 (1976).

Defendant Shields offers three reasons in support of his contention that the new evidence is material. First, defendant argues that the new evidence contradicts Cooley's testimony that judicial corruption was wide-spread in Cook County. Second, according to defendant the evidence withheld undermines Cooley's credibility. Lastly, defendant maintains that the new evidence bolsters the defense's theory that Cooley was sold a phony fix.

The court is not persuaded by defendant's arguments and denies the defendant's motion for a new trial under Rule 33. First, the new evidence that Cooley "didn't have to bribe judges" does not entirely contradict Cooley's testimony at trial. Cooley testified during the trial that he appeared before Shields many times and never had any corrupt dealings with him. Tr. 275, 1028-29, Tr. 785. He also told the jury: "[t]here were an awful lot of honest

judges." *Id.* Further, even if Cooley misled the jury about judicial corruption, this issue did not govern defendant's guilt or innocence.

Second, the court agrees that the statement withheld by the government would have aided the impeachment of Cooley. However, the court does not find that the lack of additional impeachment evidence raises a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Defendant had sufficient evidence to attack Cooley's credibility. Among other things, Cooley admitted to years of corrupt conduct as a police officer and lawyer. Tr. 220. He also testified that he bribed clerks, police officers and judges, and admitted to lying under oath.

Finally, the court is not convinced that the new evidence would have bolstered defendant's theory that Cooley was sold a phony fix. Further, even if the evidence would have bolstered defendant's theory, the court finds that it is not of such great significance that it would have changed the result of the trial. It is the opinion of this court that the government produced sufficient direct and circumstantial evidence, aside from Cooley's testimony, to support defendant's conviction.

Defendant's Rule 33 motion for a new trial is denied.